IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LARRY LOMBARDO SR. Plaintiff,	:	
v.	:	CIVIL ACTION
AIR PRODUCTS AND CHEMICALS INC., f/k/a ASHLAND SPECIALTY CORPORATION Defendants.	:	NO. 05-1120

MEMORANDUM & ORDER

YOHN, J. July ____, 2006

Plaintiff Larry Lombardo Sr. brings this lawsuit under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq*. ("ADEA"), the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. ("ADA"), the Pennsylvania Human Relations Act, 43 Pa. Stat. Ann. § 951 *et seq*. ("PHRA"),[1] the Family Medical Leave Act, 29 U.S.C. § 2601 *et seq.* ("FMLA"), and the state common law for wrongful discharge. Lombardo alleges defendant Air Products and Chemicals Inc., f/k/a Ashland Specialty Corporation ("Air Products"), failed to accommodate a known disability, discharged him because of his age, and retaliated against him for exercising his rights. Presently before the court is Air Products' motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(c). For the reasons set forth below, I will grant the motion

[1]I will not address Lombardo's PHRA claims separately because courts "generally interpret the PHRA in accord with its federal counterparts." *Kelly v. Drexel Univ.*, 94 F.3d 102, 105 (3d Cir. 1996) (citation omitted).

for summary judgment.[2]

I. FACTUAL BACKGROUND[3]

Larry Lombardo was employed by Ashland Specialty Corporation ("Ashland") from December 8, 1980, through September 2, 2003. Compl. ¶ 24. Beginning in 1999, Lombardo worked as a forklift driver at Ashland's Easton facility, where his job duties included transporting materials and loading and unloading containers and supplies from trailers. Def. Exh. A ("Lombardo Dep.") at 43-4, Def. Exh. L-1.

On May 19, 2003, Lombardo tore his rotator cuff while loading raw materials in an Ashland warehouse. Compl. ¶ 26, Lombardo Dep. 47-49. From May 19, 2003 through July 27, 2003, Lombardo continued to work in a modified position with limited duties for Ashland. Compl. ¶ 30, 32. On July 27, 2003, plaintiff began his FMLA leave,[4] which would have expired twelve weeks later, on October 19, 2003. Lombardo Dep. 56. Plaintiff underwent surgery to repair his torn rotator cuff on August 14, 2003. Lombardo Dep. 56-57. While recovering from

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[2]Plaintiff concedes that the facts of record as developed during discovery do not support his claims of age discrimination under the ADEA and PHRA. Pl.'s Answer to Def.'s Mot. For Summ. J. ¶ 2. Also, plaintiff did not brief the issues raised by defendants relating to his retaliation and wrongful discharge claims. *Id.* At oral argument, plaintiff agreed that these claims were not supported by the record and that he did not oppose the motion with regard to the retaliation and wrongful discharge claims. Therefore, summary judgment will be granted with respect to Counts I, III, V, VI, and VIII.

[3]The following account contains undisputed facts and Lombardo's factual allegations because when deciding a motion for summary judgment courts must view all facts and inferences in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc*. 477 U.S. 242, 255 (1986).

[4]Lombardo began receiving workers' compensation benefits four days after he left took leave from Ashland and continued receiving benefits during the "whole period between late 2003 and the summer of 2004." Lombardo Dep. 42, 56.

surgery, plaintiff was unable to return to work at Ashland, even with work restrictions. Lombardo Dep. 83.

Air Products purchased the assets of a division of Ashland, known as the Electronic Materials Business, on August 29, 2003. At that time Air Products began to operate the former Ashland facility in Easton. On August 11, 2003, prior to closing, Air Products sent letters to approximately forty-two Ashland employees, including plaintiff, setting forth conditional offers of employment, contingent upon being an "active employee" as of the day after closing and successfully completing a drug test. Def. Exh. L-2. In the letter, Air Products offered Lombardo the position of Warehouse Person B. *Id.* The Warehouse Person B position offered to Lombardo requires an employee to spend one hour per day lifting objects weighing over twenty pounds and to repeatedly reach above his head. Kraft Decl. ¶ 8; Def. Statement of Facts ¶ 18; Pl. Statement of Facts ¶ 18. Lombardo testified that he received a second letter that stated that if an employee was not available for work by September 2, 2003, the employee no longer had a job. Lombardo Dep. 70.

On August 18, 2003, Lombardo went to the Easton facility for a drug test and was unable to enter the facility because his swipe card did not work. Lombardo Dep. 61, 66. However, Lombardo was let into the building by a safety manager and took the drug test. Lombardo Dep. 61. Lombardo was later told by Karl Nolte, the Ashland plant manager, who became Air Products' plant manager, that his swipe card was deactivated in accordance with company procedure. Lombardo Dep. 67.

The workforce at the Easton facility was essentially the same after Air Products' acquisition as it was under the Ashland regime. Of the forty-two Ashland employees who were

offered positions by letter, thirty-nine reported to work on the day after closing and were hired by Air Products. Kraft. Decl. ¶ 6. Air Products extended offers for the Warehouse Person B position, the same position plaintiff occupied prior to his injury, to three Ashland employees, other than plaintiff. *Id.* These three individuals were active employees on the day after closing and were hired by Air Products. *Id.*

Lombardo did not appear at the Easton facility on September 2, 2003. Sometime within the week after September 2, 2003, Lombardo spoke with Nolte and asked if he was still "an employee there." Lombardo Dep. 67-68. Lombardo states that he called Nolte because of the second letter stating that if he was not available for work by September 2, 2003, he "no longer had a job." *Id.* at 70. Nolte informed Lombardo that he was no longer an employee and that he could come in to clean out his locker. *Id.* at 68. Lombardo did not ask Nolte why he was no longer an employee, whether there were any openings at Air Products, or whether there were any accommodations that could be made for him. *Id.* at 69. At the time of plaintiff's discussion with Nolte he was unable to return to work, even with accommodations. *Id.* at 69. At some point in late August or early September, Nolte allegedly told another Ashland employee, Mike O'Hara, Lombardo's union representative, that Lombardo would not be returning to work because he was "considered a broken asset." Lombardo Dep. 72-3. O'Hara informed Lombardo of Nolte's comment. *Id.* at 73-75. Lombardo did not maintain contact with Air Products with regard to the status of his shoulder and never discussed returning to work with Air Products because he states he was told by Nolte that he no longer had a job. Lombardo Dep. 67-69, Pl. Statement of Facts ¶ 22.

On September 8, 2003, approximately four weeks after the surgery, plaintiff's doctor

ordered physical therapy for Lombardo. Def. Exh. L-4, p.4. Plaintiff underwent physical therapy until January 29, 2004. Lombardo Dep. 83-86; Def. Exh. L-4, p. 5.

II. STANDARD OF REVIEW

A court may only grant a motion for summary judgement, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 743 (3d Cir. 1996) (citation omitted).

When a court evaluates a motion for summary judgment, "[t]he evidence of the non-movant is to be believed." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In addition, "[a]ll justifiable inferences are to be drawn in [the non-movant's] favor." *Id.* "Summary judgment may not be granted . . . if there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed." *Ideal Dairy*, 90 F.3d at 744 (citation omitted). However, "an inference based upon a speculation or conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment." *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990). The non-movant must show more than "[t]he mere existence of a scintilla of evidence" for elements on which he bears the burden of production. *Anderson*, 477 U.S. at 252. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citations

omitted).

III. DISCUSSION

A. FMLA Claim (Count VII)

Plaintiff alleges that Air Products violated his rights under the FMLA, 29 U.S.C. § 2601 *et seq.* Courts have recognized that the FMLA creates two types of claims, an interference claim and a retaliation claim.[5] *See Bearley v. Friendly Ice Cream Corp.*, 322 F. Supp. 2d 563, 570-71 (M.D. Pa. 2004); *Parker v. Hahnemann Univ. Hosp.*, 234 F. Supp. 2d 478, 485, 487-88 (D.N.J. 2002). An 'entitlement' or 'interference' theory claim, is based on 29 U.S.C. § 2615(a)(1), which makes it unlawful for an employer to "interfere with, restrain or deny" an employee's rights under the FMLA. The complaint states that "[b]ecause Plaintiff had previously utilized less than ten (10) days of Family and Medical leave for a serious medical condition, and because Plaintiff supplied certification from a physician indicating that the condition for which he was terminated was a 'serious health condition,' Defendant knew or should have known that the absences were protected under the Act." Compl. ¶ 95. Interference claims are not about discrimination; "[t]he issue is simply whether the employer provided its employee the entitlements set forth in the FMLA - for example, a twelve-week leave or reinstatement after taking a medical leave." *Hodgens v. Gen Dynamics Corp.*, 144 F.3d 151, 159 (1st Cir. 1998). Thus, Lombardo appears to raise an interference claim.

[5]A retaliation theory claim under the FMLA "arises under 29 U.S.C. § 2615(a)(2), which makes it unlawful for an employer to discriminate against an employee who has taken FMLA leave." *Bearley*, 322 F. Supp. 2d at 571. Plaintiff, in his complaint, does not allege that Air Products "discharge[d] or in any other manner discriminate[d]" against him "for opposing any practice made unlawful by this title." 29 U.S.C. § 2615(a)(2), Compl. ¶¶ 93-96.

To prove an interference claim, it is the plaintiff's burden to show (1) he was an eligible employee under the FMLA, (2) defendant was an employer subject to the requirements of the FMLA, (3) he was entitled to leave under the FMLA, (4) he gave notice to the defendant of his intention to take FMLA leave, and (5) the defendant was denied benefits to which he was entitled under the FMLA. *Weisman v. Buckingham Twp.*, No. 04-CV-4719, 2005 U.S. Dist. LEXIS 11696 at *11 (E.D. Pa. June 14, 2005), citing *Bearley*, 322 F. Supp. 2d at 571. Air Products argues that Lombardo was not an eligible employee under the FMLA. Def. Br. 17-18. Defendant also claims that even if Lombardo was an eligible employee, Lombardo can not establish that he was denied benefits under the FMLA because he was not capable of returning to work at his prior job at the end of his FMLA leave period. Def. Br. 18-20.

1. Is Lombardo an "eligible employee"?

An "eligible employee" is one "who has been employed for at least 12 months by the employer with respect to whom leave is requested . . . and for at least 1,250 hours of service with such employer during the previous 12-month period." 29 U.S.C. § 2611(2)(A). "Employer" is defined to include "any successor in interest of an employer." *Id.* § 2611(4)(A)(ii)(II).

Although "successor in interest" is not defined in the statute, the Department of Labor regulations provide eight factors that should be considered when evaluating whether an employer is a "successor in interest" for purposes of the FMLA:

(1) Substantial continuity of the same business operations;
(2) Use of the same plant;
(3) Continuity of the work force;
(4) Similarity of jobs and working conditions;
(5) Similarity of supervisory personnel;
(6) Similarity in machinery, equipment, and production methods;
(7) Similarity of products or services; and

(8) The ability of the predecessor to provide relief.

29 C.F.R. § 825.107(a). The regulation further provides that "determination of whether or not a 'successor in interest' exists is not determined by the application of any single criterion, but rather the entire circumstances are to be viewed in their totality." *Id.* at § 825.107(b). A court should examine these factors from the viewpoint of the employee "at or near the time of the change in employer." *Vanderhoof v. Life Extension Inst.*, 988 F. Supp. 507, 513 (D.N.J. 1997) citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987) (holding that the standards utilized in determining the successor-in-interest question must be interpreted through the employee's viewpoint). Though these regulations are not binding on the court, they do provide some guidance in answering the question of successorship.

Construing the evidence in the light most favorable to the plaintiff, Lombardo has made a sufficient showing from which a reasonable jury could find that Air Products is the successor in interest of his former employer, Ashland. It is undisputed that Air Products acquired a division of Ashland Chemical Company on August 29, 2003. Kraft Decl. ¶ 1. On that day Air Products began to operate the Easton facility where Lombardo was employed. Kraft Decl. ¶ 2. Of the 42 Ashland employees who were members of Lombardo's bargaining unit, 39 continued in the employee of Air Products. Kraft Decl. ¶ 6. Nolte was a supervisor at Ashland and also became a supervisor at Air Products on the day of the acquisition. Kraft Decl. ¶ 10. The job Lombardo was offered by Air Products, that of Warehouse Person B, would have been essentially identical to the one he had while working for Ashland. Lombardo Dep. 43-44. Based upon a weighing of all of the elements, the court concludes that a jury could find that Air Products was a "successor

in interest" to Ashland and thus was Lombardo's employer as contemplated by the FMLA.[6]

"When an employer is a 'successor in interest,' employees' entitlements are the same as if the employment by the predecessor and successor were continuous employment by a single employer." 29 C.F.R. §825.107 (c). Thus, a successor employer, like Air Products, must "continue leave begun while employed by the predecessor, including maintenance of group health benefits during the leave and job restoration at the conclusion of the leave." *Id.* Therefore, because it is undisputed that Lombardo had worked for Ashland for the requisite twelve months to be protected by the FMLA and a jury could find that Air Products became his employer for purposes of the FMLA upon the acquisition of the Easton facility, Lombardo was an "eligible employee" for summary judgment purposes. *See* Def. Statement of Undisputed Material Facts ¶ 1; Pl.'s Ans. to Def.'s Statement of Undisputed Material Facts ¶ 1.

2. Was Lombardo denied benefits to which he was entitled?

The FMLA provides that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1). The Act further ensures that

> Any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave--
> (A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or
> (B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

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[6]At oral argument, defendant claimed there was a question of fact about whether it qualified as a "successor in interest." However, defendant went on to state that it would assume it was a successor in interest for summary judgment purposes.

29 U.S.C. § 2614(a)(1).

The regulations interpreting the FMLA state, inter alia, that on return from FMLA leave, if the "employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA." 29 C.F.R. § 825.214(b). Thus, the failure to restore an employee to a position at the end of his allowed leave period does not violate the FMLA if, at the end of that period, the employee remains unable to perform the essential functions of the position. *Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155, 161 (2d Cir. 1999); *see also Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 785 (6th Cir. 1998), *Alifano v. Merck & Co.*, 175 F. Supp. 2d 792, 796 (E.D. Pa. 2001) (finding plaintiff was not qualified for her position and thus did not suffer an adverse employment action under the FMLA where she was unable to perform an essential function of her job upon return from FMLA leave), *Barry v. Wing Mem'l Hosp.*, 142 F. Supp. 2d 161, 165 (D. Mass. 2001) ("the employee must be able to return to her prior position before she has a right to reinstatement"). This is the case "even if the employer actually terminated the employee before the FMLA leave period expired, as the plaintiff contends here." *Wilcock v. Nat'l Distribs.*, Civ. No. 00-298-P-H, 2001 U.S. Dist. LEXIS 11413, *12 (D. Me. Aug. 21, 2001) citing *Cehrs*, 155 F.3d at 784-85.

It is undisputed that plaintiff began his FMLA leave on July 27, 2003, and that this leave expired twelve weeks later on October 19, 2003. Def. St. of Facts. ¶ 4; Pl. St. of Facts ¶ 4. Lifting and reaching for heavy objects are essential functions of the job at issue. *See infra* Part III.B.3. Air Products claims that Lombardo can not establish he was entitled to reinstatement after taking his medical leave because he was unable to return to work without accommodation

as of the end of his FMLA leave. Def. Br. 18-20. In his brief, plaintiff asserts that he was able to return to work at the end of FMLA leave. Pl. Br. 11. However, it is clear from the record that Lombardo was unable to perform the essential functions of his job as of October 19, 2003 and the evidence provided by the plaintiff, i.e. his deposition testimony and a letter from Dr. Reese, his orthopedist, does not create a question of material fact. *See* Pl. Exh. A; Lombardo Dep. 88.

Lombardo's brief asserts "he testified that he would have been released before October 19, but was not since he did not have a job to return to" and "that Dr. Reese would have released him to return to work in October 2003." Pl. Br. 11. However, the passage in the deposition that plaintiff cites to does not contain the cited testimony. *See* Pl. Br. 11, Lombardo Dep. 67. In fact, no where in the deposition transcript provided does Lombardo testify that he would have been released for work before October 19, 2003. Instead, while testifying about his January 29, 2004 exam with Dr. Reese, Lombardo stated that he knew Dr. Reese "had wanted me to go back to restricted duty. And I had told him I no longer had a job." Lombardo Dep. 88. Such testimony does not show that plaintiff was able to perform all of the essential functions of his job before his FMLA leave expired on October 19, 2003.

Dr. Reese's letter also does not create a question of fact as to whether Lombardo could have performed all of the essential functions of his job on October 19, 2003. The letter only supports a claim that Lombardo could have possibly returned to work in some limited capacity prior to March 4, 2004, with no indication as to when this earlier date occurred and whether Lombardo could lift and reach for heavy objects at that time. The letter states:

> It is clear from the notes that Mr. Lombardo was unable to return to work without restrictions. The physical examination revealed significant limitation of motion of the shoulder, and the need for continued physical therapy up until at least March

> 4, 2004, when note is made of the fact that Mr. Lombardo had reached the point of maximum improvement, and thus, he was able to return to limited duty. Mr. Lombardo did make it plain on March 4, 2004 that his company did not have any position for him to return on a limited basis. Although he was unable to return to full duty prior to March 4, 2004, it certainly would be my opinion that he would have been able to return to a limited job capacity with certain restrictions regarding the right upper extremity. I was never made aware of any opportunity for him to return to work on a limited basis, and thus, he was certainly not advised to do so.

Pl. Exh. A (emphasis added). Given Dr. Reese's opinion that Lombardo could only have returned in a limited capacity prior to March 4, 2004, it is unreasonable to infer that Lombardo was able to perform all of the essential functions of his job as of October 19, 2003.

The medical records compiled by Dr. Reese show that Lombardo was unable to return to perform all the essential functions of his job as of October 19, 2003. Dr. Reese's notes from October 20, 2003, state that Lombardo's "strength is improving, and he can abduct to 90 degrees. He has a little trouble getting much above that." Def. Exh. L-4, 4. At that time Dr. Reese recommended Lombardo continue with physical therapy. *Id.* On January 29, 2004, Dr. Reese noted that Lombardo "can lift a two-pound weight with abduction to 90 degrees." *Id.* at 5. He also wrote that Lombardo "is unable to return to work because of his disability at this time but I will see him back here in one month." *Id.* Thus, if Lombardo was only able to lift two pounds three months after his FMLA leave ended, it is unreasonable to infer he could have performed all of the essential functions of the Warehouse Person B job, including lifting heavy objects weighing over twenty pounds one hour per day and to repeatedly reach above his head, as of October 19, 2003. Dr. Reese first cleared Lombardo for a limited duty position on March 4, 2004. *Id.*

Even if Lombardo had been able to return to a limited capacity before October 19, 2003, "[t]he FMLA does not require that the employer provide accommodation to an employee to facilitate [his] return. Rather, the employee must be able to perform the essential functions of the job without accommodation." *Fogleman v. Greater Hazleton Health Alliance,* 122 Fed. Appx. 581, 587 (3d Cir. 2004), *see also Rinehimer v. Cemcolift, Inc.*, 292 F.3d 375, 384 (3d Cir. 2002) (finding that the district court's jury instruction that "the FMLA does not require an employer to provide a reasonable accommodation to an employee to facilitate his return to the same or equivalent position at the conclusion of his medical leave, . . . was designed to clarify for the jury the requirements of the FMLA and it did so accurately"), *Alifano v. Merck & Co.*, 175 F. Supp. 2d 792, 795 (E.D. Pa. 2001) ("Unlike the Americans with Disabilities Act (ADA), the FMLA does not require an employer to reasonably accommodate an employee's serious health condition"). Thus, Air Products was not required by the FMLA to accommodate Lombardo's lifting restrictions to facilitate his return from medical leave before October 19, 2003.

In summary, Lombardo's FMLA claim fails because he was not denied a benefit to which he was entitled under the FMLA. The fact that Lombardo was not restored to his position at the end of his FMLA leave did not infringe his FMLA rights because the record shows that at the end of his allowed leave Lombardo remained unable to perform at least one of the essential functions of the Warehouse Person B position and no reasonable jury could conclude otherwise.[7] To the

[7]Lombardo also has no grounds for relief because he lost no pay or benefits for the alleged violation of his FMLA rights. An employer who violates the FMLA is not liable for compensatory damages in general; liability is expressly limited to lost compensation and other actual monetary losses. 29 U.S.C. § 2617 (a)(1). Under the FMLA, Lombardo was entitled to twelve weeks *unpaid* leave. 29 U.S.C. § 2612 (a), (c). Thus, he was not denied any compensation from the time of the alleged violation of firing on September 2, 2003, till the end

extent that the record shows Lombardo could have returned to work at the end of his FMLA leave, he could only have done so with some form of accommodation and the FMLA does not require an employer to make accommodations to facilitate an employee's return from leave. Therefore, Air Products was not obligated by the FMLA to reinstate Lombardo to his same or equivalent position and summary judgment will be granted on this claim in favor of the defendant.

B. Disability Discrimination Claims (Counts II and IV)

Plaintiff asserts that Air Products discriminated against him because of his disability in violation of the ADA, 42 U.S.C. § 12101 *et seq.* in Count II, and the PHRA, 43 Pa. Cons. Stat. § 951 *et seq.* in Count IV. Lombardo alleges that Air Products "intentionally, knowingly and purposefully violated the [ADA] by invidiously discriminating against the qualified Lombardo who had a disability." Compl. ¶ 78. He claims that despite his disability he was "able to perform all of the essential functions of the position of Warehouse Person B with accommodation," and yet "[d]efendant actually or constructively terminated Plaintiff's employment. Compl. ¶¶ 75, 80. He also alleges that defendant "maintained and permitted to be maintained a work environment which was hostile to persons such as Plaintiff who have or are perceived as having a disability." Compl. ¶ 79; see also ¶ 86.

The ADA prohibits discrimination "against a qualified individual with a disability

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of his FMLA leave. Because plaintiff has no claim for lost wages, he cannot recover liquidated damages or interest. *See* 29 U.S.C. § 2617(a)(1)(A)(ii)-(iii). Additionally, the FMLA does not provide for nominal damages, and he is not entitled to any equitable relief. *See Walker v. UPS*, 240 F.3d 1268, 1270 (10th Cir. 2001) (finding nominal damages are not recoverable under the FMLA because they are not included in FMLA's list of recoverable damages, nor can any of the listed damages be reasonably construed to include nominal damages).

because of the disability . . . in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). In order to establish a prima facie case of disparate treatment under the ADA, a plaintiff must show "(1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of discrimination." *Gaul v. Lucent Techs., Inc.*, 134 F.3d 576, 580 (3d Cir. 1998); *see also Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 142 (3d Cir. 1998) (en banc) (citing *Gaul*).

Air Products contends that Lombardo has not set forth a prima facie case because he has failed to establish that he was ever employed by Air Products or that he suffers from a "disability" as defined by the ADA. Def. Br. 13-16. Defendant also claims that Lombardo was not capable of performing the essential functions of the Warehouse Person B position and he is therefore not a "qualified individual" under the statute. Def. Br. 12-13. The court will address each of the arguments.

1. Is Lombardo "disabled"?

The ADA defines "disability" as (1) "a physical or mental impairment that substantially limits one or more of the major life activities of . . . an individual;" (2) "a record of such an impairment; or" (3) "being regarded as having such an impairment." 42 U.S.C. § 12102(2). To satisfy the first statutory definition of "disability,"[8] a plaintiff must "show that [he] has an

[8]Plaintiff does not meet the second and third definitions of disability. For a plaintiff to have a "record of such impairment," he must have a medical history of physical or mental

impairment; identify the life activity that [he] claims is limited by the impairment; and prove that the limitation is substantial." *Fiscus v. Wal-Mart Stores, Inc*., 385 F.3d 378, 382 (3d Cir. 2004) citing *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

Lombardo's rotator cuff injury affected his lifting ability and the use of his arm and therefore constitutes a physical impairment under the ADA. *See* 29 C.F.R. § 1630.2(h) ("Physical or mental impairment means . . . [a]ny physiological disorder or condition . . . affecting one or more of the following body systems: . . . musculoskeletal . . ."); *Marinelli v. City of Erie*, 216 F.3d 354, 360 (3d Cir. 2000) (where an accident left plaintiff unable to lift more than ten pounds, plaintiff was found to have a "'condition' that affects his musculoskeletal system" and was therefore physically impaired within the meaning of the ADA).

Air Products argues that Lombardo's impairment does not "substantially limit one or more of the major life activities." 42 U.S.C. § 12102(2). The Third Circuit has adopted the EEOC's two-step analysis in determining whether an individual is substantially limited in one or more of the major life activities. *Mondzelewski v. Pathmark Stores*, 162 F.3d 778, 783-784 (3d Cir. 1998); 29 C.F.R. Pt. 1630, App. § 1630.2(j). First, the court determines whether the individual is substantially limited in any major life activity other than working. *Id.* "If the court finds that the individual is substantially limited in any of these major life activities, the inquiry ends there. On the other hand, if the individual is not so limited, the court's next step is to

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impairment or be misclassified as having such an impairment. 29 C.F.R. § 1630.2(k). Lombardo does not allege that he was discriminated against because of his prior medical history or because he was misclassified as disabled. Lombardo also does not claim that his employer regarded him as having a physical or mental impairment that substantially limited his activities though no such impairment existed; Lombardo instead asserts that he was actually impaired by his torn rotator cuff. 29 C.F.R. § 1630.2(l); Lombardo Dep. 22.

determine whether the individual is substantially limited in the major life activity of working." *Id.* "[O]nly extremely limiting disabilities -- in either the short or long-term -- . . . qualify for protected status under the ADA." *Marinelli v. City of Erie*, 216 F.3d 354, 362 (3d Cir. 2000).

Major life activities, other than working, are "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, [and] learning." 29 C.F.R. § 1630.2(I). For a plaintiff to be "substantially limited" in his ability to engage in one of these activities, he must be "(i) unable to perform a major life activity that the average person in the general population can perform; or (ii) significantly restricted as to the condition, manner, or duration under which an individual [the plaintiff] can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1)(I)-(ii). Factors to be considered in determining whether a plaintiff is substantially limited include: "(I) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. § 1630.2(j)(2)(I)-(iii).

The record shows that at the time of the alleged discrimination a reasonable jury could find that Lombardo's impairment substantially limited a "major life activity." "Lifting" and "reaching" are considered major life activities. *See Marinelli*, 216 F.3d at 363; 29 C.F.R. Pt. 1630, App. § 1630.2(i) (stating that major life activities include "sitting, standing, lifting and reaching"). Lombardo alleges that the incidents of discrimination took place "[i]n or about September 2, 2003," at which time he was "actually or constructively terminated." Compl. ¶ 80. Lombardo underwent surgery for his torn rotator cuff on August 14, 2003. Def. Exh. L-4, 3. On

September 8, 2003, Dr. Reese, Lombardo's orthopedist, reported that four weeks post operation Lombardo's arm was immobilized in a sling and he was to begin physical therapy. *Id.* at 4. Thus, at the time that Air Products allegedly failed to retain Lombardo, the record shows he was unable to lift or reach for any objects due to the rotator cuff injury. Only on October 20, 2003 do the medical records show Lombardo was first able to reach his arm slightly higher than 90 degrees. *Id.* Lombardo testified that as of January 29, 2004, approximately five months after the alleged discrimination, he was only able to lift a two-pound weight.[9] Lombardo Dep. 85; Def. Exh. L-4, 5. Therefore, because Lombardo's injury substantially limited the major life activities of reaching and lifting, a reasonable jury could find that he was disabled within the meaning of the ADA as of September 2, 2003.

2. Is Lombardo a "qualified individual"?

Defendant also argues that Lombardo can not establish his claim because he does not meet the second prong of a prima facie case of disability discrimination. Pl. Br. 12. To state a claim under the ADA, a disabled person must show that he was a "qualified individual;" that he

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[9] Air Products' argument that Lombardo is not disabled because he can currently lift ten to twenty pounds misses its mark. Pl. Br. 14; Lombardo Dep. 22. In *Marinelli v. City of Erie*, the Third Circuit held that an employee's inability to lift more than ten pounds does not constitute a "substantial limitation" on a major life activity as required to establish an ADA claim. 216 F.3d 354, 364 (3d Cir. 2000). However, the relevant time period of disability for an ADA claim is the period during which the discrimination occurred. *See* 42 U.S.C. § 12112(a). At the end of August and beginning of September 2003, the time of the alleged discrimination, Lombardo was only weeks post-operative and his arm was immobilized. Exh. L-4, 3-4. He only became able to lift two pounds five months after the alleged discriminatory behavior. Because the record shows that Lombardo was unable to lift anything at the time of the alleged discrimination, the Third Circuit's decision in *Marinelli* does not prevent this court from concluding that a reasonable jury could find that Lombardo was disabled. Lombardo's ability to now lift ten to twenty pounds does not change the fact that he could not do so at the time of the alleged discriminatory action.

was "otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer." *Gaul v. Lucent Techs.*, 134 F.3d 576, 580 (3d Cir. 1998).

A two-part test is used to determine whether an individual with a disability is "qualified." 29 C.F.R. pt. 1630, App. at 368 (2005). First, a court must "determine if the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc." *Id.* Second, the court must consider "whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation." *Id.* "The purpose of the second step is to ensure that individuals with disabilities who can perform the essential functions of the position held or desired are not denied employment opportunities because they are not able to perform marginal functions of the position." *Id.*

In the present matter, there is no suggestion Lombardo lacked the requisite experience, skill, or education for the Warehouse Person B position required to meet the first part of the test. The question is whether Lombardo could perform the essential functions of the Warehouse Person B position, with or without reasonable accommodation. The term "essential functions" means "the fundamental job duties of the employment position the individual with a disability holds or desires." 29 C.F.R. § 1630.2(n)(1). A job function "may be essential because of the limited number of employees available among whom the performance of that job function can be distributed." *Id.* Evidence of whether a particular function is essential includes, but is not limited to:

> (i) The employer's judgment as to which functions are essential;
> (ii) Written job descriptions prepared before advertising or interviewing

applicants for the job;
(iii) The amount of time spent on the job performing the function;
(iv) The consequences of not requiring the incumbent to perform the function;
(v) The terms of a collective bargaining agreement;
(vi) The work experience of past incumbents in the job; and/or
(vii) The current work experience of incumbents in similar jobs.

29 CFR 1630.2 (n)(3).

The record, when juxtaposed against these factors, shows that lifting and reaching for heavy objects are essential functions of the position. Air Products has made it clear that it considers lifting and reaching for objects over twenty pounds an essential function of the job. Kraft Decl. ¶ 8. The written job description for Warehouse Person B includes unloading and loading residue containers and product packaging supplies from trailers as two of the thirteen tasks listed. Def. Exh. L-1. Lombardo does not dispute defendant's evidence. Plaintiff agrees that it may be fairly gleaned from the written job description of "unload from trailers and load onto trailer residue containers" that overhead lifting is an essential function. Pl. Br. 15. It is undisputed that at least one hour each day is spent "lifting objects weighting over 20 pounds" and "engaged in repetitive lifting." Def. St. of Facts, ¶ 18; Pl. St. of Facts ¶ 18. Lombardo testified that when he worked at Ashland prior to his injury, he was required to lift objects more than twenty pounds or to lift objects over his head, and that he would do so for at least an hour, sometimes longer, during an eight hour shift. Lombardo Dep. 23-24. Lombardo also testified that prior to his injury he routinely unloaded containers weighing at least 50 pounds throughout his shift. Lombardo Dep. 48. It is also undisputed that as of October 2003, there were three individuals employed in the Warehouse Person B position. Def. St. of Facts, ¶ 18; Pl. St. of Facts ¶ 18. Thus, there were a limited number of employees among whom the performance of lifting heavy objects could be distributed. Therefore, the record shows there is no material issue

of fact over whether lifting and reaching for heavy objects were essential functions of the Warehouse Person B position.

Plaintiff contends that there is a question of fact as to whether or not lifting overhead is an essential function because defendant has not provided evidence meeting all of the factors listed in 29 C.F.R. § 1630.2(n)(3). However, plaintiff bears the burden of proving that he is a "qualified individual," and thus providing evidence in support of his argument that lifting and reaching are not essential functions of his job. *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999). Moreover, the EEOC's Interpretive Guidance indicates that the factors listed in 29 C.F.R. § 1630.2(n)(3) are only possible types of evidence for determining essential functions. *See* 29 C.F.R. pt. 1630, app. § 1630.2(n). A task need not meet each factor on the list to be an "essential function." The evidence of record in this case, when viewed in the light most favorable to plaintiff, shows that the tasks at issue meet many of the enumerated factors and no reasonable jury could conclude that lifting and reaching for heavy objects are not essential functions of the Warehouse Person B position.

Given that lifting and reaching are essential functions of the position, the question then becomes whether Lombardo could perform these tasks with or without out reasonable accommodation. The determination of whether an individual with a disability is qualified to perform the essential functions of a job, with or without reasonable accommodation by the employer, is made at the time of the employment decision, not at the time of the lawsuit. *Gaul*, 134 F.3d at 580. It is clear from the record that Lombardo was unable to perform the essential functions of the Warehouse Person B position on September 2, 2003, the date of the alleged discriminatory termination. It is undisputed that as of September 8, 2003 Lombardo was unable to return to work in *any* capacity, even with work restrictions. Def. St. of Facts, ¶ 5; Pl. St. of

Facts, ¶ 5. Lombardo himself claims only "that he could have returned to work as of October 19, 2003." Pl. St. of Facts, ¶ 7. Thus, on September 2, 2003, Lombardo could not perform the essential functions of lifting and reaching without some accommodation.

Plaintiff argues there is a genuine issue of material fact regarding his ability to perform the essential functions of the job with a reasonable accommodation. Lombardo claims that he could have returned to work if the essential functions of lifting and reaching were allocated to another employee as a reasonable accommodation. Pl. Br. 15. Defendant claims that the ADA does not extend the term "reasonable accommodation" to include eliminating an essential function of the position. Defendant argues that it was not required to eliminate the essential functions of lifting and reaching to accommodate plaintiff.

The law supports defendant's view. Though the ADA defines the term reasonable accommodation to include "job restructuring," the EEOC regulations interpreting the ADA state that reasonable accommodation means "[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position." 29 C.F.R. § 1630.2(o)(1)(ii). The regulations state that "an employer or other covered entity is not required to reallocate essential functions" as a reasonable accommodation. 29 C.F.R. Pt. 1630 App. 1630.2(o). Thus, a reasonable accommodation is a change that helps a disabled individual perform the essential functions of the job, not a modification that reinvents the position.

The Third Circuit has stated that "employers are not required to modify the essential functions of a job in order to accommodate an employee." *Donahue v. CONRAIL*, 224 F.3d 226,

232 (3d Cir. 2000) (decided under the Rehabilitation Act, 29 U.S.C. § 794, using the standards applied under the ADA). "A request to be exempted from an essential duty" is "not an accommodation designed to help [plaintiff] perform" the job. *Id.* Other circuits have more specifically held that eliminating an essential function of the job or reallocating job duties to change the essential functions of a job are not reasonable accommodations under the ADA. *See Turco v. Hoechst Celanese Chem. Group,* 101 F.3d 1090, 1094 (5th Cir. 1996) (finding that an accommodation that would result in other employees having to work harder or longer is not a reasonable accomodation under the ADA.)*; Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1124-25 (10th Cir. 1995) ("An employer is not required by the ADA to reallocate job duties in order to change the essential function of a job. An accommodation that would result in other employees having to work[] harder or longer hours is not required."), *Gilbert v. Frank*, 949 F.2d 637, 642 (2d Cir. 1991) ("'reasonable accommodation' does not mean elimination of any of the job's essential functions."); *Hall v. United States Postal Service,* 857 F.2d 1073, 1078 (6th Cir. 1988) ("an accommodation that eliminates an essential function of the job is not reasonable").

Where plaintiffs have sought to lessen their physical duties as a reasonable accomodation for their disability, the courts have not required employers to accomodate their requests where the physical duties were essential to the position. *See Rucker v. City of Philadelphia,* Civ. No. 94-0364, 1995 U.S. Dist. LEXIS 11104, at *6-8 (E.D. Pa. 1995) (finding that where plaintiff's back injuries prevented him from performing an essential function of his job, "reasonable accommodation" did not require defendant to eliminate physical requirements of job to accommodate plaintiff since reasonable accommodation does not mean eliminating essential function of job).

As stated above, lifting and reaching are essential functions of the Warehouse Person B position. Plaintiff now seeks to have these tasks reallocated to other employees. Eliminating these tasks or reassigning them to other employees was not required as a 'reasonable accommodation' under the ADA. Such a reassignment of those two responsibilities could not be considered a reasonable accommodation, especially because plaintiff never requested such an accommodation from Air Products prior to bringing this lawsuit and he had not obtained release from his doctor to return to work in any capacity as of September 2, 2003. Lombardo Dep. 68-69. Though Dr. Reese's letter states that Lombardo could have returned to work in a limited job capacity earlier than March 4, 2004, he does not specify on what date Lombardo could have returned or what types of jobs Lombardo could have performed during his continuing recovery. Pl. Exh. A. As Lombardo was not capable of performing the physically demanding aspects of the Warehouse Person B position, he has not demonstrated that he could perform the essential functions of the job with or without reasonable accommodations. Thus, Lombardo is not a "qualified individual" within the meaning of the ADA.

3. Did Lombardo suffer an adverse employment decision?

Finally, and most importantly of all, plaintiff needs to proffer evidence he suffered an adverse employment decision to prove a prima facie ADA claim. Plaintiff asserts that he was "actually or constructively terminated" from employment by Air Products on or about September 2, 2003. Compl. ¶¶ 40, 80. Defendant argues that Lombardo was not terminated because it never employed him. Def. Br. 13. Under the ADA, an employer may not discriminate "against a qualified individual with a disability because of the disability of such an individual in regard to . . . discharge of employees." 42 U.S.C. § 12112(a). However, the record does not show sufficient

evidence for a reasonable jury to find that plaintiff was ever employed by Air Products, such that defendant could have fired him.

Plaintiff argues that if he is an employee of Air Products under the FMLA, he is also an employee under the ADA because Air Products was required to hire him back under the FMLA after his FMLA leave ended. But plaintiff states no legal authority to support his argument. The ADA does not contain the successor in interest language of the FMLA. Factually, Air Products was not required to rehire plaintiff even under the FMLA at the end of his FMLA leave because Lombardo was unable to perform the essential functions of his job as Warehouse Person B. *See supra* Part III.A.2. Additionally, plaintiff is considered an employee of Air Products under the FMLA because the FMLA specifically defines "employer" to include "any successor in interest of an employer." 29 U.S.C. § 2611(4)(A)(ii)(II). However there is no parallel "successor in interest" language in the ADA's definition of employer.[10] *See* 42 U.S.C. § 12111 (5) (defining "employer").

[10]"Successor liability" claims do arise under the ADA when a plaintiff attempts to hold a successor company liable for the predecessor company's alleged discriminatory acts. *See Rego v. ARC Water Treatment Co. of Pennsylvania*, 181 F.3d 396, 401 (3d Cir. 1999) (recognizing that in employment discrimination cases, an aggrieved employee may enforce a claim or judgment against a successor that would have been valid against the predecessor where the assets of the predecessor have been transferred to the successor); *See also Brzozowski v. Corr. Physician Servs.*, 360 F.3d 173, 179 (3d Cir. 2004) ("The doctrine of successor liability is premised on the idea that the creditor cannot obtain satisfaction from the predecessor"); *Shevack v. Litton Applied Tech.*, 95 Civ. 7740, 1998 U.S. Dist. LEXIS 12748 at *7 (S.D.N.Y. Aug. 17,1998) (citations omitted) (granting defendant's summary judgment motion because defendant, a purchaser of assets, had no notice of plaintiff's discrimination claim prior to its dealings with the predecessor-violator). Here, plaintiff argues that he was terminated by Air Products, not Ashland. Plaintiff does not claim that Air Products should be held liable for Ashland's discriminatory acts or that Ashland committed any discriminatory act, and thus there is no successor liability under the ADA.

Air Products acquired the Easton facility from Ashland as part of a sale of assets on August 29, 2003. Pl. St. of Facts ¶ 13; Def. St. of Facts ¶ 13. When the deal closed, Lombardo did not automatically become an employee of Air Products. For him to become an employee, Air Products had to hire him. In the letter dated August 11, 2003 Air Products offered Lombardo the position of Warehouse Person B, contingent upon his "being an active employee on the day after closing and having successfully completed a controlled substance screening." Def. Exh. L-2. Despite his shoulder injury Lombardo went to the site for a drug test on August 18, 2003. Lombardo Dep. 61. Though the words "active employee" are somewhat ambiguous, Lombardo's shoulder injury did not prevent him from showing up at the Easton facility on September 2, 2003,[11] or at a minimum, calling in to confirm his employment status. Lombardo never indicated to Air Products on the date designated in the offer letter, September 2, 2003, his intention to accept Air Product's offer of employment. Thus, he was never hired.

Lombardo knew that if he was not available for work on September 2, 2003, he was not hired. He testified that he received a "letter stating that if I wasn't available for work September 2nd, that I no longer had a job." Lombardo Dep. 70. Lombardo did not go to the Easton facility on September 2, 2003 and did not call Nolte, the plant manager, until sometime in the week after September 2, 2003, to discuss this letter. *Id.* Lombardo then asked Nolte if he was employed and Nolte said no. *Id.* at 67-8. Lombardo did not ask Nolte why he was no longer employed, whether there were any other openings at the facility, or whether any accommodations could be

[11]Air Product's purchase of assets closed on August 29, 2003. The first business day after the closing was September 2, 2003.

made in the future for him to return to work.[12] *Id.* at 68-69. Thus, Lombardo was aware that his offer was contingent upon being available for work on September 2, 2003, and he took no steps on that date or in his conversation with Nolte a week later to indicate that he accepted the offer, so no employment relationship was formed.

In summary, Lombardo's status as an employee of Air Products under the FMLA did not make Lombardo an employee under the ADA. Ashland's sale of the Easton facility to Air Products was a sale of assets and as such Lombardo did not automatically become an employee of Air Products upon closing. The record shows that no reasonable jury could find that Lombardo was ever actually hired by Air Products and thus he was never terminated by the defendant. Accordingly, the plaintiff did not suffer an adverse employment decision.

Defendant's motion for summary judgment on Lombardo's ADA and PHRA claims will be granted. Plaintiff has failed to put forth sufficient evidence to show that he suffered an adverse employment action.

IV. CONCLUSION

For the reasons explained above, I will grant Air Products' motion for summary judgment. An appropriate order follows.

[12]Lombardo also testified that he never called Air Products or Nolte to ask for his job back once he was able to work. Lombardo Dep. 71-73.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LARRY LOMBARDO, SR. Plaintiff,	:	
v.	:	CIVIL ACTION
AIR PRODUCTS AND CHEMICALS INC., f/k/a ASHLAND SPECIALTY CORPORATION, Defendant.	:	NO. 05-1120

ORDER

AND NOW, this _____ day of July, 2006, upon consideration of defendant Air Products' motion for summary judgment (Doc. No. 7), plaintiff Larry Lombardo's response, and Air Products' reply, and after oral argument, it is hereby ORDERED that defendant's motion for summary judgment is GRANTED and judgment is ENTERED in favor of defendant Air Products and Chemicals Inc. and against plaintiff Larry Lombardo.

/s William H. Yohn, Jr., Judge

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William H. Yohn. Jr., Judge